

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

IN THE MATTER OF REQUEST FOR REVIEW)
BY TELEQUALITY COMMUNICATIONS, INC.)
OF DECISION OF UNIVERSAL SERVICE) WC DOCKET NO. 02-60
ADMINISTRATOR)

Background

TeleQuality Communications, Inc. (TQCI) is a provider of telecommunications service currently serving Gonzales Community Health Center (Gonzales) under the Universal Service Fund (USF) Rural Health Care (RHC) program. Gonzales received denial of funding notices for two circuits provided by TQCI. Gonzales appealed these denials to the Universal Service Administrative Company (USAC), which upheld the denials. TQCI is hereby appealing the USAC decision to the Federal Communications Commission (FCC) pursuant to FCC rules.¹ The standard of review in this case is *de novo* review.²

Statement of Facts

On August 25, 2014 Gonzales signed a service agreement with TeleQuality Communications, Inc. (TQCI) for Bonded T1 (10.5 Mbps) service (FRN 1558207, BA# GON.TX.0001).³ On January 13, 2015, Gonzales submitted a Funding Year 2015 FCC Form 465 requesting telecommunications services. Gonzales elected to continue the Bonded T1 (10.5 Mbps) service under the existing contract with TQCI and submitted a Form 466 on March 19, 2015. Later, Gonzales stated that they wished to upgrade the existing Bonded T1 (10.5 Mbps) service to a higher bandwidth and TQCI submitted a bid proposing a DS3 (45 Mbps) service.⁴ On October 19, 2015 Gonzales signed a service agreement for a DS3 (45 Mbps) service (FRN 1581234, BA# GON.TX.0008)⁵, which eventually replaced the existing Bonded T1 (10.5 Mbps) service.

On April 5, 2016 Gonzales signed two additional service agreements based on the FY 2015 Form 465 for two new circuits unrelated to the services listed above. These new agreements were for (1) Bonded T1 (10.5 Mbps) service (FRN 1687929, BA# GON.TX.0009)⁶ and (2) Ethernet (10 Mbps) service (FRN 1687934, BA# GON.TX.0010).⁷ Provisioning for these services began during FY 2015 but TQCI was unable to deliver the service before funding year end.

¹ 47 C.F.R. § 54.719(b) (2014).

² 47 C.F.R. § 54.723 (2002).

³ Contract GON.TX.071814.0101.

⁴ Emails between Reid Freeman and Raziel De La Barreda (*Upgrade Emails*).

⁵ Contract GON.TX.0080315.0134.

⁶ Contract GON.TX.031716.0040.

⁷ Contract GON.TX.031716.0041.

On May 24, 2016 Gonzales submitted an additional FCC Form 465 for FY 2016. Gonzales reported receiving no bids for service based on the FY 2016 Form 465. Gonzales elected to continue service under their existing contracts with TQCI, which were signed on April 5, 2016. On July 1, 2016 the services governed by those existing contracts were officially activated for the customer. On August 29, 2016 Gonzales submitted FCC Forms 466 relating to those services. On November 2, 2016 Gonzales received notice that funding for those services was denied.⁸ On November 14, 2016 Gonzales appealed the funding denial decision to USAC.⁹ On January 11, 2017 Gonzales received notice that USAC upheld its prior funding denials.¹⁰

Discussion

USAC appears to have gotten confused when trying to associate FCC Forms 465, contracts, and FCC Forms 466 with the correct underlying customer circuits, as evidenced by the text and citations of the Decision. TQCI currently provides various types of telecommunications service to 9 locations for Gonzales, each of which is governed by a separate contract. Each circuit has a unique Billing Account Number (BA #) and Contract Number. Included as exhibits hereto are the relevant contracts, as well as a spreadsheet¹¹ laying out the complete timeline for each circuit. Those items, in conjunction with the facts laid out above, should assist in resolving the confusion USAC experienced, which formed the basis for incorrectly denying one of the FRN's in question.

Additionally, both FRN's in question should have been approved per FCC rules, which provide an exception to the cited violation of competitive bidding rules when "(i) the applicant is choosing to continue service under an existing contract; (ii) the applicant competitively bid the services for the new funding year; and (iii) the applicant decides, after reviewing the competitive bids, to continue with the existing contract."¹²

Once TQCI receives a signed contract, the provisioning process begins and the customer receives weekly updates on the status of the order. In the matter at hand, TQCI received signed contracts on April 5, 2016 and placed orders to the underlying carrier later in April, thus beginning the provisioning process. Provisioning a telecommunications network encompasses preparation of the service by the underlying carrier, facility work, configuration and installation of the customer premise equipment (CPE), and finally a test and turn up (TTU) process. The TTU process consists of connecting CPE to the circuit, testing the circuit, and customer acceptance of the circuit upon completion of testing. The intent of both TQCI and Gonzales was to have these services active as quickly as possible, and certainly within the then-active funding year. Due to the lack of carrier facilities and availability of technicians in this rural area, TQCI was unable to accomplish service activation prior to the end of FY 2015. However, TQCI was clearly working diligently on behalf of the customer, and regularly communicating this work to the customer, for the entire duration of time between receipt of signed customer contracts and eventual service activation. Although the

⁸ USAC Denial Notice 1 & USAC Denial Notice 2.

⁹ USAC Denial Appeal.

¹⁰ Administrator's Decision on Rural Health Care Program Appeals (*Decision*).

¹¹ Document Associations.

¹² *Request for Review Franciscan Skemp Waukon Clinic*, WC Docket No. 02-60, Order, 29 FCC Rcd 11714, 11715, para. 3 (2014) (*Waukon Order*) (citing to *Request for Review of the Decision of the Universal Service Administrator by Kalamazoo Pub. Schs.*, CC Docket No. 96-45, Order on Reconsideration, 17 FCC Rcd 22154, 22157-58, paras. 6-7 (2002)).

underlying service hadn't been activated, and thus the customer had not started receiving service bills, it is illogical to argue that TQCI was not providing valuable service to its customer.

Further, it is illogical to argue that TQCI and Gonzales did not have a binding contract for service as of the contract execution date because the billing section of said contract states that "term shall begin upon circuit completion date." The fact that a length of time for service provision, and the associated time to be billed for that service, might start at a future date does not nullify an immediate contractual obligation that has been agreed upon and executed by both parties at a date previous to the time when service and billing begins. It is common, practical, and in many cases necessary, for contracts to be executed months prior to expected performance of some of the obligations contained therein. Mutuality of obligation is not voided simply because full performance has not yet taken place. In fact, arguing such a point would go against the basis of established contract law. Therefore, Gonzales clearly had a valid and enforceable, existing contract under which it chose to continue receiving service from TQCI at the time it ultimately submitted the FRN's in question. Gonzales expected to receive telecommunications service as quickly as possible from TQCI, which, in turn, was working diligently to accomplish the task.

When service activation was not able to be completed prior to the end of FY 2015, Gonzales submitted a 465 for FY 2016. Gonzales indicated that no other bids were received, and subsequently opted to continue receiving service from TQCI under the previously-executed contract. Additionally, there is no evidence indicating Gonzales did not carefully consider all available proposals based on the FY 2016 Form 465. Thus, it is reasonable in this case, as was done in *Cochrane-Fountain City School District Order*¹³ to conclude that such consideration was given.¹⁴ The fact that the only proposal available to consider was an existing contract doesn't negate the ability of Gonzales to properly consider and elect it. Further, by posting the FY 2016 Form 465 and waiting over 3 months before submitting FRN's for the services selected, Gonzales clearly waited the minimum 28 days required by the FCC rules. Again, this is the same standard applied in *Cochrane-Fountain City School District Order*.¹⁵

Once confusion around the facts is resolved, it's clear that Gonzales' behavior falls within the FCC rules discussed above. However, it is also clear that the confusion could have been further avoided by taking different action in a couple places. First, Gonzales could have filed Forms 466 in FY 2015 with full knowledge that they would be denied, since billing had not yet started. Doing so would have caused unnecessary work for all parties involved, but would have preserved the record that the applicant was under contract for service and was attempting to seek support for that service. In doing so, the following funding year's Forms 466 would not be deemed, as they were in this case, to be requests for support of brand new contracts. The analysis for denying the FRNs in question is heavily based on the fact that Gonzales did not file FY 2015 FRNs and therefor the filing of them in FY 2016 could not have possibly been a continuation of service under an existing

¹³ Request for Review by Cochrane-Fountain City School District, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc., File No. SLD-140683, CC Dockets No. 96-45 and 97-21, Order, 15 FCC Rcd 16628 (Com. Car. Bur. 2000) (*Cochrane-Fountain City School District Order*).

¹⁴ *Id.* at 16631, n. 24.

¹⁵ *Id.* at para. 7.

contract.¹⁶ This could have been precluded by knowingly creating extra work for everyone involved, which is a perverse incentive that should be avoided.

Second, Gonzales could have memorialized the selection of its existing, prior contracts with TQCI for FY 2016 and entered the dates of memorialization on the FRNs, rather than the underlying contract dates, as noted in the *Kalamazoo Order*.¹⁷ While this action would have been helpful, and will likely be the process followed in this type of situation moving forward now that the parties are aware of such guidance, doing so is not an FCC or USAC requirement for which the failure to comply is grounds for funding denial. Neither is unfamiliarity with this guidance itself grounds for funding denial.

In this case, all parties involved had a clear intent, which was manifested by the documents provided herewith, and followed program rules in carrying out that intent. It's the unfortunate truth that program timelines and technical requirements sometimes result in edge-cases like this where bad luck can create friction between "natural-world" realities and "artificial-world" requirements. Here, the logistics of procuring the facilities and personnel in a rural area caused service activation timing issues that resulted in the denial of these FRNs. However, all parties followed program rules and did their best to achieve the desired intent as quickly as possible. The fact that the intent of the parties was carried out in a way that is confusing or could be argued, albeit incorrectly, on a technical basis to be non-compliant with program rules speaks to the complexity of the program itself. Thus, we are left with a situation where the underlying spirit of the program, assisting healthcare providers in rural communities to receive support for the costly, yet necessary, telecommunications service required to provide quality healthcare today, finds itself at odds with the program rules governing that spirit. Likewise, the intent of the parties is being challenged on technical grounds, using confused facts and impractical expectations for real world behavior and performance. We would be remiss if we didn't note that situations like this may become more numerous in the future, given recent changes in the program to implement different funding windows, thus causing more opportunity for edge-cases where unforeseen timing issues cause friction with program requirements.

It's clear that program rules are needed to ensure that no waste, fraud, and abuse of limited fund resources occurs. However, it's also clear that these rules sometimes create new problems that do not exist in traditional transactions of a similar nature. There is a duty to protect taxpayers and the fund itself, but not at the expense of program participants that are navigating a complex and confusing set of rules which sometimes finds itself in conflict with the underlying mission of the program. While we must be vigilant in protecting those resources from bad actors, we must be equally vigilant in protecting our rural healthcare providers from draconian punishment when action that may be confusing, but is clearly not improper, has occurred. While we hope that this example serves as the starting place for larger-scale review and revision of program rules and procedures in the future, in the immediate term we request that the FRNs at issue in this case be approved.

¹⁶ *Decision* at para. 8.

¹⁷ *Request for Review of the Decision of the Universal Service Administrator by Kalamazoo Pub. Schs.*, CC Docket No. 96-45, Order on Reconsideration, 17 FCC Rcd 22154, 22157-58, para. 7 (2002) (*Kalamazoo Order*).

Conclusion

TQCI respectfully requests that the FCC overturn the USAC decision and approve funding for Gonzales under the FRNs at issue in this case.

Respectfully submitted,

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Date: March 10, 2017